In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1501

LOUIS A. RUGGIRELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of having willfully attempted to evade and defeat substantial parts of his income tax liability for the years 1963, 1964 and 1965, in violation of 26 U.S.C. 7201. He was fined a total of $15,000 and sentenced to concurrent prison terms of two, three, and five years on the three counts (A. 3).[1]

[1] References designated "A." are to the printed appendix filed in the court below; those designated "Tr." are to the typewritten transcript of the trial proceedings.

The court of appeals affirmed the judgment of conviction on January 14, 1972 (Pet. 15, 17), and a petition for rehearing was denied on March 27, 1972 (Pet. 18). The petition for a writ of certiorari was filed on May 17, 1972, and therefore is out of time under Rule 22(2) of this Court's Rules.

The evidence at trial established that petitioner had willfully failed to report income of $5,760.01 in 1963, $33,168.63 in 1964, and $11,573.28 in 1965 (Govt. Ex. 709, p. 2; Tr. 3061-3062), and that he had thereby attempted to evade income taxes totalling $1,591.41 in 1963, $22,791.36 in 1964, and $7,438.84 in 1965(Govt. Exs. 710, 711, 712; Tr. 3063-3065). The evidence included exemplars of petitioner's handwriting, which the district court had ordered petitioner to furnish (Pet. App. D, 19); certain documents, the authorship of which was disputed; and the testimony of a handwriting expert that the documents were in petitioner's handwriting (Pet. 5).

Petitioner argues (Pet. 6-10, 12-13) that the order of the district court requiring him to give handwriting exemplars before trial violated his rights under the Fourth and Fifth Amendments to the Constitution and was in any event outside the court's authority under Rules 16 and 17(c), Fed.R.Crim.P.

1. The taking of handwriting exemplars does not violate the Fifth Amendment privilege against compelled self-incrimination. *Gilbert* v. *California*, 388 U.S. 263, 265-267; *Schmerber* v. *California*, 384 U.S. 757, 764. Furthermore, when the handwriting exemplars were offered in evidence at trial, petitioner had no objections (A. 256).

2. Contrary to petitioner's contention (Pet. 6-7), the decision below does not conflict with *In re Dionisio*, 442 F. 2d 276 (C.A. 7), certiorari granted May 30, 1972, *sub nom. United States* v. *Dionisio* (No. 71-229), and *In re September 1971 Grand Jury*, 454 F. 2d 580 (C.A. 7), certiorari granted May 30, 1972, *sub nom. United States* v. *Mara* (No. 71-850). Those decisions of the Seventh Circuit held that the Fourth Amendment imposes on the government the burden of showing "reasonableness" to justify a grand jury subpoena and court order that a witness execute handwriting exemplars. The courts below were not directly confronted with the issue of "reasonableness" and it is not presented on this record, for petitioner failed to raise any Fourth Amendment claim in the district court.[2] The government could have met a timely demand for a showing of "reasonableness" by showing (1) that the indictment established probable cause to believe that petitioner was guilty of the offenses charged (*Ex parte United States*, 287 U.S. 241, 250); (2) that a material issue existed as to the authorship of certain handwriting on applications for cashier's checks; and (3) that identifying the handwriting on such applications and checks constituted part of the government's attempt to reconstruct petitioner's correct income (A. 310-312).

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[2] As petitioner states (Pet. 11-12), he did oppose the prosecution's motion for production of handwriting exemplars in the district court. However, this opposition was based solely on Fifth Amendment grounds (A. 4-15).

Contentions as to unreasonable search and seizure are normally waived if not raised prior to trial. *Nardone* v. *United States*, 308 U.S. 338, 341-342; *Segurola* v. *United States*, 275 U.S. 106, 111-112. This is particularly true where the alleged error could have been cured had a timely objection been made. *Chew* v. *United States*, 298 F. 2d 334 (C.A. D.C.); *United States* v. *Sten*, 342 F. 2d 491, 493 (C.A. 2); *United States* v. *Mitchell*, 432 F. 2d 354, 356 (C.A. 1).

3. Similarly, petitioner's contention (Pet. 12-13) that the district court's order was not authorized by the Federal Rules of Criminal Procedure was not, as he concedes, raised in the courts below. It is therefore not properly before this Court. *Duignan* v. *United States*, 274 U.S. 195, 200. In any event, district courts have inherent power to order defendants to furnish handwriting exemplars after indictment and before trial. *United States* v. *Izzi*, 427 F. 2d 293, 296 (C.A. 2), certiorari denied, 399 U.S. 928.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

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